

## UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

## REGION IX

IN THE MATTER OF:	)	EPA DOCKET NUMBER 2002-04
LORENTZ BARREL & DRUM	)	
SUPERFUND SITE	)	
	)	
UNDER THE AUTHORITY OF THE	)	AGREEMENT
COMPREHENSIVE ENVIRONMENTAL	)	AND COVENANT NOT TO SUE
RESPONSE, COMPENSATION, AND	)	10th STREET LAND MANAGEMENT
LIABILITY ACT OF 1980, 42 U.S.C.	)	
§ 9601, <u>et seq.</u> , as amended.	)	

I. INTRODUCTION

This Agreement and Covenant Not to Sue ("Agreement") is made and entered into by and between the United States on behalf of the Environmental Protection Agency ("EPA") and 10th Street Land Management (Settling Respondent) (collectively the "Parties").

This Agreement is entered into pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9601, et seq. and the authority of the Attorney General of the United States to compromise and settle claims of the United States.

The purpose of this Agreement is to facilitate the maintenance of remedial facilities and the development of the Lorentz Barrel & Drum Superfund Site, CAD029295706, in San Jose, California (the "Site"). 10th Street Land Management is a California corporation formed to acquire the Site from the Lorentz Estate, which plans to operate the property as a parking and storage facility for commercial trucks, other vehicles and equipment.

The property was owned and operated for many years by Ernest Lorentz as an industrial container recycling facility, and is now opened by Mr. Lorentz's estate, which is insolvent. In 1988, EPA issued the Operable Unit 2 ROD for shallow groundwater extraction and treatment and in 1990 EPA and eleven Potentially Responsible Parties (PRPs) signed a Consent Decree requiring the PRPs to design, construct, and operate a shallow groundwater extraction and

treatment system as specified in the 1988 ROD. In 1992, EPA and a different group composed of seven PRPs signed an Administrative Consent Order to remove and dispose of remaining barrels, sumps, drums and debris. In 1993, the EPA issued the Operable Unit 1 ROD to address all remaining sources of contamination not previously addressed at the property. Final construction of the Operable Unit 1 remedy, which included installation of an asphaltic cap, soil vapor extraction system and groundwater monitoring, was completed in September 1998.

The Parties agree to undertake all actions required by the terms and conditions of this Agreement. The purpose of this Agreement is to settle and resolve, subject to reservations and limitations contained in Sections VIII, IX, X, and XI, the potential liability of the Settling Respondent for the Existing Contamination at the Property which would otherwise result from Settling Respondent becoming the owner of the Property.

The Parties agree that the Settling Respondent's entry into this Agreement, and the actions undertaken by the Settling Respondent in accordance with the Agreement, do not constitute an admission of any liability by the Settling Respondent.

The resolution of this potential liability, in exchange for provision by the Settling Respondent to EPA of a substantial benefit, is in the public interest.

## II. DEFINITIONS

Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations, including any amendments thereto.

1. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.
2. "Existing Contamination" shall mean
  - a. any hazardous substances, pollutants or contaminants present or existing on or under the Property as of the effective date of this Agreement;

b. any hazardous substances, pollutants or contaminants that migrated from the Property prior to the effective date of this Agreement; and

c. any hazardous substances, pollutants or contaminants presently at the Site that migrate onto or under or from the Property after the effective date of this Agreement.

3. "Institutional Controls" shall mean the obligations set forth in the Covenant to Restrict Use of Property/Environmental Restriction, a similar form of which is attached hereto as Exhibit 1, to be entered into between the Settling Respondent and the State of California Department of Toxic Substances Control ("DTSC").

4. "Parties" shall mean the United States on behalf of EPA, and the Settling Respondent.

5. "Property" shall mean that portion of the Site, encompassing approximately five acres, located at 1507 South 10th Street, San Jose, Santa Clara County, California, which is described in Exhibit 2 of this Agreement.

6. "Settling Respondent" shall mean 10th Street Land Management, and its officers, directors, agents, representatives, and employees.

7. "Site" shall mean the Lorentz Barrel & Drum Superfund Site located at the corner of S. 10th Street and Alma in San Jose, California, approximately five acres depicted generally on the map attached as Exhibit 3. The Site shall include the Property, and all areas to which hazardous substances and/or pollutants or contaminants have come to be located.

8. "United States" shall mean the United States of America, its departments, agencies, and instrumentalities.

### III. STATEMENT OF FACTS

9. Settling Respondent is not a PRP and has no current obligations with respect to the Site. As part of the consideration for the entering into of this Agreement, Settling Respondent has entered into a Prospective Purchaser Agreement with the California DTSC undertaking continuing obligations with respect to the ongoing inspection, maintenance, and improvement of the asphalt cap, retaining walls and concrete structures, and security fencing and gates at the Property.

Additionally, the Settling Respondent has agreed to pay DTSC the sum of \$192,000 and agreed to DTSC's Covenant to Restrict Use of Property/Environmental Restriction (see Exhibit 1 hereto). Subject to approval of the Santa Clara County Probate Court, Settling Respondent has secured the agreement of the Estate and the known heir, Ms. Joyce Daniels, to sell the Property to it.

10. The Settling Respondent represents, and for the purposes of this Agreement EPA relies on those representations, that Settling Respondent has had no involvement with the Property or the Site.

#### IV. PAYMENT

11. In consideration of and in exchange for the United States' Covenant Not to Sue in Section IX herein and Removal of Lien in Section XXI, Settling Respondent agrees to pay to EPA the sum of \$408,000, within 30 days of the effective date of this Agreement. The Settling Respondent shall make all payments required by this Agreement in the form of a certified check or Electronic Funds Transfer ("EFT" or wire transfer) made payable to "EPA Hazardous Substance Superfund," referencing EPA Region IX, EPA Docket number 2002-04, and Site ID# 0989 and name and address of Settling Respondent. Wire transfer payments shall be made in accordance with instructions to be provided to Settling Respondent by EPA following the effective date of this Agreement.

12. Certified checks, along with a transmittal letter, shall be sent to:

EPA Region IX  
Attn: Superfund Accounting  
P.O. Box 360863M  
Pittsburgh PA 15251

Notice of payment (including a copy of the checks and transmittal letter) shall be sent to those persons listed in Section XV (Notices and Submissions) and to:

Donald Loi  
Financial Management Specialist (PMD-6)  
U.S. EPA Region IX  
75 Hawthorne Street, San Francisco, CA 94105

Section Chief  
Environmental Enforcement Section  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611  
Attn: Bradley O'Brien

The cash amount paid by Settling Respondent pursuant to this Agreement shall be deposited into a Special Account and shall be retained and used to conduct or finance response actions at or in connection with the Site, or transferred by EPA to the EPA Hazardous Substance Superfund.

13. Amounts due and owing pursuant to the terms of this Agreement but not paid in accordance with the terms of this Agreement shall accrue interest at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), compounded on an annual basis.

#### V. WORK TO BE PERFORMED

14. Settling Respondent agrees to perform the work described in the Statement of Work, attached as Exhibit 4 hereto, in consideration for this agreement. The work to be performed includes the routine inspection, maintenance, and improvement of the asphalt cap, retaining walls and concrete structures, and providing security fencing and gates at the Property.

#### VI. ACCESS/NOTICE TO SUCCESSORS IN INTEREST

15. Commencing upon the date that it acquires title to the Property, Settling Respondent agrees to provide to EPA, the California DTSC, and their authorized officers, employees, representatives, and all other persons performing response actions under EPA or DTSC oversight, an irrevocable right of access at all reasonable times to the Property for the implementation of response actions at the Site, for the purposes of performing and overseeing response actions at the Site under federal and state law. EPA agrees to provide reasonable notice to the Settling Respondent of the timing of response actions to be undertaken at the Property. Notwithstanding

any provision of this Agreement, EPA retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, ("RCRA") et. seq., and any other applicable statute or regulation, including any amendments thereto.

16. With respect to any Property owned or controlled by the Settling Respondent that is located within the Site, within 15 days after the effective date of this Agreement or the date of acquisition of any Property, whichever date is later, the Settling Respondent shall submit to EPA for review and approval a notice to be filed with the Recorder's Office, Santa Clara County, State of California, which shall provide notice to all successors-in-title that the Property is part of the Site, that EPA selected remedies for the soil and groundwater contamination at the site on September 22, 1988 and August 26, 1993, and that potentially responsible parties have implemented part of the remedies pursuant to a Partial Consent Decree in United States v. E.I. duPont de Nemours & Co., et al., filed on July 6, 1990 in the United States District Court for the Northern District of California, case number C 90 0488 EFL and an Administrative Order on Consent in United States v. Eastman Kodak Company, et al., issued in October, 1992, EPA Region 9 Order No. 92-29, Administrative Record Number AR0536. The Settling Respondent shall record the notice within 10 days of EPA's approval of the notice. The Settling Respondent shall provide EPA with a certified copy of the recorded notice(s) within 10 days of recording such notice.

17. The Settling Respondent shall ensure that assignees, successors in interest, lessees, and sublessees of the Property shall provide the same access and cooperation, including any Institutional Controls. The Settling Respondent shall ensure that a copy of this Agreement is provided to any current lessee or sublessee on the Property as of the effective date of this Agreement and shall ensure that any subsequent leases, subleases, assignments or transfers of the

Property or an interest in the Property are consistent with this Section, and Section XII (Parties Bound/Transfer of Covenant), and Section V (Work to be Performed) of the Agreement..

## VII. DUE CARE/COOPERATION

18. The Settling Respondent shall exercise due care at the Site with respect to the Existing Contamination and shall comply with all applicable local, State, and federal laws and regulations. The Settling Respondent recognizes that the implementation of response actions at the Site may interfere with the Settling Respondent's use of the Property, and may require closure of its operations or a part thereof. The Settling Respondent agrees to cooperate fully with EPA in the implementation of response actions at the Site and further agrees not to interfere with such response actions. EPA agrees, consistent with its responsibilities under applicable law, to use reasonable efforts to minimize any interference with the Settling Respondent's operations by such entry and response. In the event the Settling Respondent becomes aware of any action or occurrence which causes or threatens a release of hazardous substances, pollutants or contaminants at or from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Settling Respondent shall immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall, in addition to complying with any applicable notification requirements under Section 103 of CERCLA, 42 U.S.C. §9603, or any other law, immediately notify EPA of such release or threatened release.

## VIII. CERTIFICATION

19. By entering into this agreement, the Settling Respondent certifies that to the best of its knowledge and belief it has fully and accurately disclosed to EPA all information known to Settling Respondent and all information in the possession or control of its officers, directors, employees, contractors and agents which relates in any way to any Existing Contamination or any

past or potential future release of hazardous substances, pollutants or contaminants at or from the Site and to its qualification for this Agreement. The Settling Respondent also certifies that to the best of its knowledge and belief it has not caused or contributed to a release or threat of release of hazardous substances or pollutants or contaminants at the Site. If the United States determines that information provided by Settling Respondent is not materially accurate and complete, the Agreement, within the sole discretion of the United States, shall be null and void and the United States reserves all rights it may have.

#### IX. UNITED STATES' COVENANT NOT TO SUE

20. Subject to the Reservation of Rights in Section X of this Agreement, upon payment of the amount specified in Section IV (Payment) of this Agreement, the United States covenants not to sue or take any other civil or administrative action against Settling Respondent for any and all civil liability for injunctive relief or reimbursement of response costs pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. §§ 9606 or 9607(a) with respect to the Existing Contamination.

#### X. RESERVATION OF RIGHTS

21. The covenant not to sue set forth in Section IX above does not pertain to any matters other than those expressly specified in Section IX (United States' Covenant Not to Sue). The United States reserves and the Agreement is without prejudice to all rights against Settling Respondent with respect to all other matters, including but not limited to, the following:

(a) claims based on a failure by Settling Respondent to meet a requirement of this Agreement, including but not limited to Section IV (Payment), Section V (Work to be Performed), Section VI (Access/Notice to Successors in Interest), Section VII (Due Care/Cooperation), and Section XV (Payment of Costs);

(b) any liability resulting from past or future releases of hazardous substances, pollutants or contaminants, at or from the Site caused or contributed to by Settling Respondent, its



successors, assignees, lessees or sublessees;

(c) any liability resulting from exacerbation by Settling Respondent, its successors, assignees, lessees or sublessees, of Existing Contamination;

(d) any liability resulting from the release or threat of release of hazardous substances, pollutants or contaminants, at the Site after the effective date of this Agreement, not within the definition of Existing Contamination;

(e) criminal liability;

(f) liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessment incurred by federal agencies other than EPA and which is not due to existing contamination;

(g) liability for violations of local, State or federal law or regulations; and

(h) liability for institutional controls as set forth in the Covenant to Restrict Use of Property/Environmental Restriction (see Exhibit 1), to be entered into between Settling Respondent and DTSC.

22. With respect to any claim or cause of action asserted by the United States, the Settling Respondent shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Existing Contamination.

23. Nothing in this Agreement is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any person, firm, corporation or other entity not a party to this Agreement.

24. Nothing in this Agreement is intended to limit the right of EPA to undertake future response actions at the Site or to seek to compel parties other than the Settling Respondent to perform or pay for response actions at the Site. Nothing in this Agreement shall in any way

restrict or limit the nature or scope of response actions which may be taken or be required by EPA in exercising its authority under federal or state law. Settling Respondent acknowledges that it is purchasing Property where response actions may be required.

#### XI. SETTling RESPONDENT'S COVENANT NOT TO SUE

25. In consideration of the United States' Covenant Not To Sue in Section IX of this Agreement, the Settling Respondent hereby covenants not to sue and not to assert any claims or causes of action against the United States, its authorized officers, employees, or representatives with respect to the Site or this Agreement, including but not limited to, any direct or indirect claims for reimbursement from the Hazardous Substance Superfund established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507, through CERCLA Sections 106(b)(2), 111, 112, 113, or any other provision of law, any claim against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related to the Site, or any claims arising out of response activities at the Site, including claims based on EPA's oversight of such activities or approval of plans for such activities.

26. The Settling Respondent reserves, and this Agreement is without prejudice to, actions against the United States based on negligent actions taken directly by the United States, not including oversight or approval of the Settling Respondent's plans or activities, that are brought pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA. Nothing herein shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

#### XII. PARTIES BOUND/TRANSFER OF COVENANT

27. This Agreement shall apply to and be binding upon the United States, and shall apply to and be binding upon the Settling Respondent, its officers, directors, and employees. The United

States' Covenant Not to Sue in Section IX and Contribution Protection in Section XIX shall apply to Settling Respondent's officers, directors, or employees, to the extent that the alleged liability of the officer, director, or employee is based on its status and in its capacity as an officer, director, or employee of Settling Respondent, and not to the extent that the alleged liability arose independently of the alleged liability of the Settling Respondents. Each signatory of a Party to this Agreement represents that he or she is fully authorized to enter into the terms and conditions of this Agreement and to legally bind such Party.

28. Notwithstanding any other provisions of this Agreement, all of the rights, benefits and obligations conferred upon Settling Respondent under this Agreement may be assigned or transferred to any person with the prior written consent of EPA which shall exercise its discretion in accordance with applicable federal law, policies, and regulations.

29 The Settling Respondent agrees to pay the reasonable costs incurred by EPA to review any subsequent requests for consent to assign or transfer the benefits conferred by this Agreement.

30. In the event of an assignment or transfer of the Property or an assignment or transfer of an interest in the Property, the assignor or transferor shall continue to be bound by all the terms and conditions, and subject to all the benefits, of this Agreement except as EPA and the assignor or transferor agree otherwise and modify this Agreement, in writing, accordingly. Moreover, prior to or simultaneous with any assignment or transfer of the Property, the assignee or transferee must consent in writing to be bound by the terms of this Agreement including but not limited to the certification requirement in Section VIII of this Agreement in order for the Covenant Not to Sue in Section IX to be available to that party. The Covenant Not To Sue in Section IX shall not be effective with respect to any assignees or transferees who fail to provide such written consent to EPA.

### XIII. DISCLAIMER

31. This Agreement in no way constitutes a finding by EPA as to the risks to human health and the environment which may be posed by contamination at the Property or the Site nor constitutes any representation by EPA that the Property or the Site is fit for any particular purpose.

### XIV. DOCUMENT RETENTION

32. The Settling Respondent agrees to retain and make available to EPA all business and operating records, contracts, Site studies and investigations, and documents relating to hazardous substances, pollutants or contaminants at the Property, for at least ten years, following the effective date of this Agreement unless otherwise agreed to in writing by the Parties. At the end of ten years, the Settling Respondent shall notify EPA of the location of such documents and shall provide EPA with an opportunity to copy any documents at the expense of EPA.

### XV. PAYMENT OF COSTS

33. If the Settling Respondent fails to comply with the terms of this Agreement, it shall be liable for all litigation and other enforcement costs incurred by the United States to enforce this Agreement or otherwise obtain compliance.

### XVI. NOTICES AND SUBMISSIONS

34. All notices to Settling Respondent shall be sent to:

Jerry Daniels, President  
10th Street Land Management  
6438 Berwickshire Way  
San Jose, CA 95120  
tel (408) 323-1708 / fax (413) 647-2442

All notices to the United States should be sent to:

William Keener, ORC-1  
Assistant Regional Counsel  
U.S. EPA  
75 Hawthorne Street  
San Francisco, CA 94105

with a copy to:

Diane Strassmaier, SFD-7-4  
Superfund Project Manager  
U.S. EPA  
75 Hawthorne Street  
San Francisco, CA 94105

#### XVII. EFFECTIVE DATE

35. If the EPA and the Attorney General's designee approve this Agreement prior to the date Settling Respondents take possession or control of the Property, and EPA does not withdraw or modify its consent to this Agreement after reviewing public comments, then the effective date of this Agreement shall be the date upon which Settling Respondents take possession or control of the Property. If the EPA or the Attorney General's designee does not execute this Agreement, or if EPA withdraws or modifies its consent to this Agreement after reviewing public comments, or Settling Respondents take possession or control of the Property prior to the date the Regional Administrator and the Assistant Attorney General approve this Agreement, then there is no Agreement and no effective date.

#### XVIII. TERMINATION

36. If any Party believes that any or all of the obligations under Section VI (Access/Notice to Successors in Interest) are no longer necessary to ensure compliance with the requirements of the Agreement, that Party may request in writing that the other Party agree to terminate the provision(s) establishing such obligations; provided, however, that the provision(s) in question shall continue in force unless and until the party requesting such termination receives written agreement from the other party to terminate such provision(s).

#### XIX. CONTRIBUTION PROTECTION

37. With regard to claims for contribution against Settling Respondent, the Parties hereto agree that the Settling Respondent is entitled to protection from contribution actions or claims as

provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for matters addressed in this Agreement. The matters addressed in this Agreement include all response actions taken or to be taken and response costs incurred or to be incurred by the United States or any other person for the Site with respect to the Existing Contamination.

38. The Settling Respondent agrees that with respect to any suit or claim for contribution brought by it for matters related to this Agreement it will notify the United States in writing no later than 60 days prior to the initiation of such suit or claim.

39. The Settling Respondent also agrees that with respect to any suit or claim for contribution brought against it for matters related to this Agreement it will notify in writing the United States within 10 days of service of the complaint on them.

#### XX. EXHIBITS

40. Exhibit 1 shall mean a form similar to the Covenant to Restrict Use of Property/ Environmental Restriction to be entered into between Settling Respondent and DTSC.

41. Exhibit 2 shall mean the description of the Property which is the subject of this Agreement.

42. Exhibit 3 shall mean the map depicting the Site.

43. Exhibit 4 shall mean the Statement of Work.

#### XXI. REMOVAL OF LIEN

44. Subject to the Reservation of Rights in Section X of this Agreement, upon payment of the amount specified in Section IV (Payment), EPA agrees to remove any lien it may have on the Property under Section 107(l) of CERCLA, 42 U.S.C. § 9607(l), as a result of response action conducted by EPA at the Property.

#### XXII. PUBLIC COMMENT


45. This Agreement shall be subject to a thirty-day public comment period, after which

EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or inadequate.

IT IS SO AGREED:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BY:

  
for \_\_\_\_\_ 11/20/2001  
Keith Takata, Director Date  
Superfund Division  
EPA Region IX

IT IS SO AGREED:

UNITED STATES DEPARTMENT OF JUSTICE

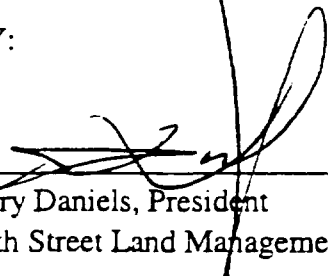
BY:


\_\_\_\_\_  
John C. Cruden Date  
Acting Assistant Attorney General  
Environment and Natural Resources Division  
United States Department of Justice

IT IS SO AGREED:

10TH STREET LAND MANAGEMENT

BY:

  
\_\_\_\_\_  
Jerry Daniels, President 9-7-01  
10th Street Land Management Date

 12-12-01  
\_\_\_\_\_  
John C. Cruden Date  
Acting Assistant Attorney General  
Environment and Natural Resources Division  
United States Department of Justice

IT IS SO AGREED:  
10TH STREET LAND MANAGEMENT

BY:

\_\_\_\_\_  
Jerry Daniels, President Date  
10th Street Land Management